

Frequently Asked Questions regarding Public Contracts

4-28-11

Long ago, if a governmental entity breached a contract and the vendor didn't get paid, it was immune from liability and suit. Now immunity from liability and suit in state courts has been waived for written contracts for goods or services provided to certain local governmental entities, including HCFC and HCHD. See Tex. Loc. Gov't Code §§ 271.151 - .160; cf. Tex. Loc. Gov't Code §262.007 (waiver of county's immunity to suit in connection with public works projects). Whether immunity from suit may be waived by conduct is unclear. One thing is clear, draftsmanship is a prized commodity.

1. When the Purchasing Agent issues an RFP or takes bids for goods and services, the commissioners court usually awards the contract by adopting an order and authorizing the County Judge to execute any necessary documents. As a matter of practice, the Purchasing Agent issues a Purchase Order and the county auditor certifies that current funds are available to pay the County's obligations under the contract.

Should/Must we draft a document to memorialize the essential terms negotiated by our clients under the following scenarios:

- After CCt awards a contract for goods or services based on the lowest and best bid?
 - After CCt awards a contract for goods or services based on a best and final offer after an RFP?
 - After CCt approves a memorandum of understanding for the delivery of goods or services to the County?
 - After CCt approves letter or other Document(s) for goods and services to be provided to the county?
 - None or all of the above without a purchase order issued by the Purchasing Agent or certification of funds by the county auditor?
 - After Purchasing Agent approves a purchase order and county auditor certifies that current funds are available to pay the County's obligations?
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- A city ordinance may be a written contract. **City of Houston v. Williams**, 2011 WL 92390 (Tex. 3-18-11). Unilateral employment contract in this case. City made a promise, the firefighters relied on it. Right to benefit vested upon performance of the specific services performed for the benefit of the City. The mayor didn't execute or finalize the document since City Council passed the ordinance on behalf of the City. The obligation was payable from current funds.
 - In **City of Houston v. Petroleum Traders Organization**, __ S.W.3d __ (Tex.App.-Houston [14th Dist] 2008), the City solicited bids for supplying fuel, plaintiff submitted the lowest bid, City Council voted to award the contract, an award letter was sent to confirm the award but the bid documents were not signed by the mayor and countersigned by the controller. Based on the bid documents and council's motion approving the contract, the court found that the contract was "properly executed" without the mayor's signature or controller's countersignature. See also *City of Houston v. Clear Channel*, 233 S.W.3d 441 (Tex.App.-Houston [14th Dist.] 2007, no pet.)
 - Two ordinances and related documents together comprise a written contract. *Fort Worth Independent School District v. City of Fort Worth*, 22 S.W.2d 831 (Tex. 2000). The multiple documents need not contain all of the terms; instead, only the essential terms are required. **Osborne v. Moore**, 112 Tex. 361, 247 S.W. 498 (Tex. 1923).
 - No particular words are required to create a contract; therefore the fact that an ordinance does not contain the word "contract" in its text does not preclude it from having contractual effect. **City of Houston v. Williams**, 2011 WL 92390 (Tex. 3-18-11). It can be a memorandum of

understanding (“MOU”) or an agreement. While a letter of intent is generally unenforceable, read the documents to ensure that it does not contain the essential terms of a contract.

- A collective bargaining agreement is a contract for services to be provided to a local governmental entity.

According to the Supreme Court, the following are the elements of a contract under §271.151 - (1) the contract must be in writing, (2) state the essential terms of the agreement, (3) provide for goods or services, (4) to the local governmental entity, and (5) be properly executed on behalf of the local governmental entity. *City of Houston v. Williams*.

We have noted that to “execute” means to “finish” or to “complete,” and that it is not necessary to sign an instrument in order to execute it, unless the parties agree that a signature is required. *Mid-Continent Cas. Co. v. Global Enercom Mgmt., Inc.*, 323 S.W.3d 151, 157 (Tex. 2010) (per curiam). (But see discussion on limit of appropriations.)

My suggestions:

- The title of the document doesn’t matter. Look at the substance rather than the form.
- No particular words are required but their absence or inclusion does matter.
- Write plainly so that Accounts Payable and a jury can understand the terms.
- Avoid ambiguity. If exists, clarify the terms. If it doesn’t exist in a proposed draft, don’t create it.
- If you don’t understand who the parties are and what goods should be delivered or what services will to be performed, how are you and your client going to explain the terms to a jury if the contract goes south?
- Will a purchase order suffice? Generally, if it relates to delivery of specific supplies or new equipment, a purchase order will suffice assuming that the purchase order’s fine print includes a right to terminate immediately for any reason.
- Purchasing services, such as architectural or engineering services, is more complex than buying paper for the copier. Many years ago, the Purchasing Agent issued a purchase order for testing services for an amount not to exceed \$75,000. The Department wanted to terminate the contract because it was not satisfied and so that it could “unencumber the money” and give the contract to another vendor but there was no termination clause in the purchase order.
- Certainly, you need more than a one-pager for the purchase of software which must be customized and implemented or to lease and develop the Astrodome.
- And/or. Learn to punctuate. This form is confusing.

2. Who is authorized to contract and bind entity?

- Commissioners Court acting as body and subject to budget may bind the county; if not from current funds, levy of tax to create sinking fund; No individual member of the Commissioners Court may bind the county.
- Commissioners Court acting as a body may bind the Flood Control District. No individual member may bind the Flood Control District.
- Bd. of Managers acting as a body may bind the Hospital District.
- Delegation of Authority
- No delegation of authority without express authority:
Tex. Health & Safety Code § 281.047. The board shall manage, control, and administer the hospital or hospital system of the district.
§ 281.049. Purchasing and Accounting Methods and Procedures
(a) The commissioners court may prescribe:
(1) the method of making purchases and expenditures by and for the district; and
(2) accounting and control procedures for the district.

(b) The commissioners court by resolution or order *may delegate* its powers under Subsection (a) to the board.

(c) A county officer, employee, or agent shall perform any function or service required by the commissioners court under this section.

- Without statutory authority, a creature of statute may delegate only ministerial or administrative functions which do not require the exercise of any discretion
- Purchasing Agent may bind county for purchases under \$50,000.
- Sheriff – jail commissary funds - HC Commissioners Court approval required for 5-year contracts with suppliers paid with jail commissary funds; sheriff must provide copies of Ks w/i 10 days and no disbursements without approval of Commissioners Court
- Specialized local entity: DA, Juvenile Bd, and Community Supervision & Protection for non-county funds (Tex. Loc. Gov't Code §140.003 – grants, forfeiture funds) but must provide a budget to the commissioners court within 10 days after its adoption. Must provide a financial statement for previous fiscal year to CCT. Funds are subject to competitive bidding and subject to audit by the county auditor. *See also* Tex. Att'y Gen. No. GA-53 (2003) ([W]hile the District Attorney has discretionary authority over the moneys in the "hot check" fund, nothing in the language of article 102.007 purports to give him the contractual authority asserted here. "The district attorney had no authority to enter into a contract requiring the expenditure of county funds." Tex. Att'y Gen. Op. No. JC-0395 (2001) at 2. Accordingly, however these public funds may be denominated, the District Attorney has no authority to pledge them, whatever his power to expend them.)
- *Sui juris?* Building, Dept., Office
- *Personal services* – Contract with individual, not a corporation which is a legal fiction. Independent contractor versus employee – based on economic reality test - economic dependence on employer instead of in business for self. The following factors indicate independent contractor status if the factors apply to the individual(s) as follows:
 - No instructions. An independent contractor does not receive instructions from the engaging entity as to how to accomplish a job.
 - No training. An independent contractor does not receive training from the engaging entity.
 - No integration. The engaging entity's operations or ability to be successful does not depend on the service of independent contractors. By contrast, the factor weighs in favor of employee status if the workers constitute a critical and essential part of the taxpayer's business. *Bartels v. Birmingham*, 332 U.S. 126 (1947).
 - Services do not have to be rendered personally. Because independent contractors are in business for themselves and are contracted with to provide a certain result, they have the right to hire others to assist them.
 - Control their own assistants. Independent contractors retain the right to control the work activities of their assistants.
 - Not a continuing relationship. Unlike employees, independent contractors generally do not have a continuing working relationship with the engaging company, although the relationship may be frequent, by means of multiple engagements.
 - Work hours are set by the independent contractor. An independent contractor has control over the hours worked for accomplishing the result.
 - Time to pursue other work. An independent contractor is free to work when and for whom the individual chooses. A requirement to work full-time indicates control by the engaging entity.
 - Job location. Unless the services cannot be performed elsewhere, an independent contractor has the right to choose where the work will be done.

- No requirements on the order or sequence of work. Independent contractors have control over how a result is accomplished and, therefore, determine the order and sequence in which their work will be performed.
- No required reports. Independent contractors are accountable for accomplishing the objective only; interim or progress reports are not required.
- Payment for the result. Independent contractors are paid by the job and are not compensated based on the time spent performing the work.
- Business expenses. Independent contractors are responsible for their incidental expenses.
- Own tools. As business owners, independent contractors provide their own equipment and tools to do the job.
- Significant investment. An independent contractor's investment in his or her trade is bona fide, essential, and adequate.
- Possible profit or loss. Independent contractors bear the risk of realizing a profit or incurring a loss.
- Working for multiple firms. Independent contractors are free to work for more than one firm at a time.
- Services available to the general public. Independent contractors make their services available to the general public.
- Limited right to discharge. An independent contractor is not terminable at will, but may be terminated only for failure to comply with the terms of the contract.
- Liability for noncompletion. Independent contractors are responsible for the satisfactory completion of a job and are liable for failing to complete the job in accordance with the contract.

If you contracting with an employee, make sure that you notify auditor so that proper withholdings may be made – more appropriate to create a temporary position without benefits.

Joint employer – for certain purposes – use of staffing or employment agencies who fail to make proper withholdings and payments – ensure that agency has resources to pay IRS, SS, wc, unemployment tax, etc.

- Professional services – Which profession is it?
 - Professional Services Procurement Act (Tex. Gov't Code §2254.02) "Professional services" means services:
 - (A) within the scope of the practice, as defined by state law, of: (i) accounting; (ii) architecture; (iii) landscape architecture; (iv) land surveying; (v) medicine; (vi) optometry; (vii) professional engineering; (viii) real estate appraising; or (ix) professional nursing; or
 - (B) provided in connection with the professional employment or practice of a person who is licensed or registered as: (i) a certified public accountant; (ii) an architect; (iii) a landscape architect; (iv) a land surveyor; (v) a physician, including a surgeon; (vi) an optometrist; (vii) a professional engineer; (viii) a state certified or state licensed real estate appraiser; or (ix) a registered nurse.
 - Consulting is not a profession.

3. **Recitals** – nice but not required since not intended to bind but merely set forth certain desires and facts. Therefore, don't incorporate the terms of any exhibits in the recitals. It makes no sense.

4. **Representations** –

- licensed or certified to perform service
- authorized to do business in Texas
- no delinquent local or state taxes
- qualified personnel to perform services – enough personnel to timely perform the services or one man with one truck to pick up hurricane debris?
- Warranties for goods or services
- Assumptions upon which offer made
- Will represent but will not warrant or guarantee
- Legality/enforceability is a question of law; client should not make this representation
- Don't agree to comply with future laws since contracts are construed based upon law in existence at time of execution of contract (future laws – speculative/ambiguous obligations)

5. Scope of services.

- Of course, counties can only contract for county purposes and districts can only contract for district purposes. Unless a statute authorizes the county or district purpose, there is no basis for the contract. While county and district purposes are public purposes, not all public purpose are county or district purposes.
- Client must “clearly” communicate the scope or deliverables. If the client asks you to review a proposed contract provided by a vendor, ask if s/he can summarize the terms for you.
- Would a jury understand the scope? Are the specifications in the RFP or bid clear? Have you clearly delineated what terms are non-negotiable (i.e. no advance payments, all amendments/change orders must be approved by the governing body, prices must include all costs, certification of funds, etc.)
- If you don't have the technical expertise to draft a particular contract, ask for help. Note that about 50% of IT implementation projects fail.
- By making process and deliverables/services more explicit, you improve predictability around results.
 - In an IT contract, ask if the client has requirements software expert to assist in drafting and managing changes to requirements.
 - What are the minimum business standards and timelines?
- What are the client's obligations –
 - provide “adequate” staffing and space to assist?
 - Prohibited from hiring staff for a year?
- Avoid ambiguity in the terms – terms to be determined later means you've got an agreement to agree and that won't cut it.

6. Term or length of K. When does the term begin and end?

- Evergreen or automatic renewal but subject to annual appropriation of funds. How are increased rates evidenced upon renewal? Best practice – an amendment but could be “order/resolution.”
- Fund for entire term if multiyear contract without “funding out” clause.
- Option to renew.
 - What happens if someone forgets to exercise the option?
 - Once the term ends, it can't be revived or amended. No backdating. May require rebidding.
- Effective date: date of execution or approval of funding by auditor or controller, whichever is later.
- Bases for termination?
 - Non-appropriation.
 - For convenience – without cause by governmental entity
 - Immediate termination without opportunity to cure (force majeure, loss of license, conviction)
 - With notice and opportunity to cure (payment, force majeure, etc.)

- Bankruptcy

Terminating projects:

- Associated expenses. Canceling a project can result in considerable expense. Be prepared to discuss the financial repercussions under the contract. For example, State of California terminated an IT contract but had to pay its vendor over \$100 million even though the product couldn't be used. The federal government is in much the same boat but with more dollars at issue.
- Unexpected behavior. Canceling a project can lead to unanticipated (and sometimes undesirable) behavior. Timing is critical. One software company reduced the size of the project team, making it impossible for the remaining members to complete the project. Another refused to allow District to hire its employees.
- Supplier relationships. Project cancellations affect your suppliers. Increased risks, increased cost.
- Media coverage. The permanence of blogs, wikis and archives (combined with comprehensive search capabilities) make it easy to keep a story alive forever. It is increasingly important to deal with employee complaints openly, fairly, and in a timely and straightforward manner.
- Political fallout. Design a response to creatively mute the critics without being overly defensive.
- Reality check – if you don't terminate, poor or non-performance could get worse.

7. Compensation, Payments. Invoices

- What are the assumptions or bases for payment?
- Does compensation include all costs? Taxes, overhead, delivery or transportation costs (only pay for fees set forth in contract – funding issue)
- Payment upon acceptable delivery of goods or other deliverable (i.e. final report or audit)
- Completion of project
- Advance payments. Unconstitutional lending of credit.
 - How ensure that acceptable product will be delivered?
 - What safeguards are in place? Insurance? Performance bond?
- Flat or hourly hour up to max; retainage (% of total withheld) until acceptance of product
- Interim payments with objective criteria for milestones.
 - Assess discrepancies between level of completion in plan/project (milestones) with actual deliverable. How many times has your client paid 90% for less than 90% of the work?
 - Quality management – quality, functionality and timely delivery of features; integration with current system(s); compliance with state and federal law
- Interest on undisputed amounts after 30 days of receipt of goods or services. No payments within 15 days. Pending bill would require payment of interest on disputed amounts, too.
- Attorney's fees – goods or services – note that Ch. 271 was amended in 2009 to authorize atty's fees even if parties had not agreed to pay them.

8. Independent Contractor – not employee or joint venture. See discussion above regarding scope and possible of joint liability in employment situations.

9. *Limit of Appropriation – Protection of the fisc.* Note that Tex. Loc. Gov't Code §111.093 provides that in order to have a binding county contract for purchases, contracts, salaries, or labor expenses paid with county funds, the auditor must determine whether current funds are available to fund the county's obligations.

Sec. 111.093. **APPROPRIATIONS FOR PURCHASES, CONTRACTS, SALARIES, OR LABOR EXPENSES IN COUNTY WITH POPULATION OF MORE THAN 225,000.** (a) This section applies only to a county with a population of more than 225,000.(b) The county auditor shall charge all purchase orders, requisitions, contracts, and salary and labor allowances to

the appropriation accounts.(c) **A requisition issued or a contract for work, labor, services, or materials and supplies that is entered into in the manner provided by law by a proper authority is not binding until the county auditor certifies that the budget contains an ample provision for the obligation and that funds are or will be available to pay the obligation when due.**(d) **The amount allocated in the budget for a purchase order, requisition, contract, special purpose, or salary or labor account may not be allocated for any other purpose unless an unexpended balance remains in the account after full discharge of the obligation or unless the requisition, contract, or allocation is canceled in writing by the commissioners court or a county officer for a valid reason.**

In the event that current funds are not available to fund the county's obligations, then it must either terminate negotiations or levy a tax to create a "sinking fund" in accordance with Tex. Const. art. XI, §7.

Sec. 5. CITIES OF MORE THAN 5,000 POPULATION; ADOPTION OR AMENDMENT OF CHARTERS; TAXES; DEBT RESTRICTIONS. Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters. If the number of inhabitants of cities that have adopted or amended their charters under this section is reduced to five thousand (5000) or fewer, the cities still may amend their charters by a majority vote of the qualified voters of said city at an election held for that purpose. The adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature, and no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State. Said cities may levy, assess and collect such taxes as may be authorized by law or by their charters; but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half per cent of the taxable property of such city, **and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent thereon.** Furthermore, no city charter shall be altered, amended or repealed oftener than every two years. **(City of Houston)**
(Amended Aug. 3, 1909, Nov. 5, 1912, and Nov. 5, 1991.)

Tex. Const. art. XI, § 7. COUNTIES AND CITIES ON GULF OF MEXICO; TAX FOR SEA WALLS, BREAKWATERS, AND SANITATION; BONDS; CONDEMNATION OF RIGHT OF WAY. All counties and cities bordering on the coast of the Gulf of Mexico are hereby authorized upon a vote of the majority of the qualified voters voting thereon at an election called for such purpose to levy and collect such tax for construction of sea walls, breakwaters, or sanitary purposes, as may now or may hereafter be authorized by law, and may create a debt for such works and issue bonds in evidence thereof. **But no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent (2%) as a sinking fund;** and the condemnation of the right of way for the erection of such works shall be fully provided for. **(Harris County)**
Acts 1987, 70th Leg., ch. 149, Sec. 1, eff. Sept. 1, 1987.

What is a debt?

A debt is any pecuniary obligation imposed by the contract which will not be paid with current funds. Note that the county's outside auditors require "reserves" similar to or

greater than the amounts in Tex. Const. art. XI, § 7 in order to approve the county's financials.

Why are these certifications necessary?

Because neither the State nor any county nor any city may operate in the red. They must balance their budgets. Either the county has current funds in the budget or it doesn't. **Note that this provision is not self-executing. It requires affirmative action by the commissioners court to levy a tax if current funds are insufficient or not available to pay the contractual obligations.**

However, in *City of Houston v. Williams*, the Supreme Court concluded that a city ordinance or series of city ordinances may create a unilateral employment contract. In this case, Ordinance offered the firefighters specific compensation in the form of overtime and termination pay in exchange for their firefighting services. The ordinance provided the "essential terms," among other things, the time of performance, the price to be paid, and the services to be rendered. **The Ordinances were executed by the City upon being duly enacted. "We have noted that to 'execute' means to finish' or to 'complete,' and that it is not necessary to sign an instrument in order to execute it, unless the parties agree that a signature is required."** (Emphasis added.) Therefore, the Ordinances, when duly enacted by the City with the intent to be bound, were "executed" under section 27.151(2). With regard to failure to comply with the constitutional requirement of providing funding for contractual obligations, Justice Guzman concludes that **"[i]n practice, municipal contract expenses can be covered with current revenues."**

This case converted an illusory promise or moral obligation into a legal obligation since there is no evidence that current funds were available then or that a tax was levied or sinking fund created in the adopted orders or ordinances.

I guess the Supreme Court hasn't heard about the City of Houston's furloughs, layoffs, and budget cuts because the City is struggling to meet its contractual obligations, including the pension obligations imposed by the legislature for police officers and firefighters. Apparently, there is no "reserve" or "sinking" fund for this obligation which apparently vested when the employees performed the services.

Either the lawyers didn't explain this applicable constitutional provision well or the court assumed facts not in evidence in order to reach a result.

10. Notices (e-mail, fax, s-mail, personal delivery, etc.) – Unless the governing body is authorized to delegate the approval of notice to terminate contract, it must approve termination. Certainly, a department may request that the vendor cease and desist but that is not effective termination. Since termination can trigger obligations of a surety to complete the project, be careful.

11. Confidentiality and applicability of Public Information Act and HIPAA.

12. Tax-exempt status – provision of tax exempt certificate; no liability for personal or property taxes (all taxes included in price/bid (funding issue))

13. Applicable law and venue; non-waiver of remedies and immunities under state law or constitution.

- Agreement to authorize injunctive relief – no
- Agreement to compliance with future laws - no
- Waiver of right to jury

- Non-binding mediation;
- Arbitration
- Damages – actual, no consequential or punitive damages

14. Contract creates no personal liability for any officer or employee of County/District.

15. No third-party beneficiaries

16. Indemnification for vendor's acts.

17. Insurance – to back up indemnification.

18. Assignment

19. Multiple counterparts - Who can sign the contract?

- Since the Purchasing Agent may bind the entity for purchases of goods that do not exceed \$50,000, he may sign the contract on behalf of the entity.
- Traditionally, the Harris County Commissioners Court has authorized the County Judge to perform the ministerial function of signing contracts approved by the Commissioners Court.
- Commissioners Court/BOM may delegate ministerial or administrative functions which do not involve the exercise of any discretion to any officer or employee. The signing or execution of a contract is ministerial after the governing body has approved the contract.
- Electronic signatures – Business & Commerce Code ch. 322

20. What does “approved as to form” mean?

- Traditionally, this office has taken the position that you, on behalf of the office, reviewed the terms and that, on its face, the agreement is a valid, binding contract that it does not contain any terms which may violate any law or constitutional provision.
 - For example, there's no consideration for an amendment that would pay the vendor more for the same services Consideration may be benefit to promisor; detriment to promise.
 - Non-compliance with competitive bidding – no exception -push the envelope over the line
 - Public servant gives business to a family member or to someone who gave him/her a gift without properly disclosing it. Tex. Loc. Gov't Code Chapters 171 & 176
 - Penal Code;
 - Nepotism;
 - Tex. Const. art. III, §50, 51, 52(a), 53
 - Ultra vires act – approved contract in executive session – TOMA violation
 - Lack of tax levy and sinking fund for multiyear contract to be paid with future funds, no right to terminate at end of each year – Tex. Const. art. XI, §7
- A public entity may pay twice for the design of a building (policy) but it can't pay the same vendor for the same work twice (legality). Imprudent or unwise terms or inefficient use of public funds is not illegal. However, it may not be in the best interest of the public.
- Contracts may be easy or hard to draft depending on who is negotiating. Some departments and purchasing agents are better than others. Generally, purchasing assists the department in the negotiations. This assumes that one or both are familiar with the scope of the project and the specific services to be provided.
- In your letter or memo to your client (County/District), address the policy issues raised in the contract so that client is aware of the risk(s) (i.e. waiver of jury trial, application of foreign law, venue in another state, binding arbitration, lack of insurance, sufficiency of safeguards to ensure

performance, refusal to indemnify for own acts, agreement not to hire vendor's employees, upfront funding for entire term, etc.). Since we represent the "entity" and its taxpayers, in the past we have highlighted terms that are onerous or perhaps are not in the best interests of the County/District. The decisions of the governing body are subject to judicial review – abuse of discretion standard.

- While the approval covers the legality of the instrument in a broad sense, it doesn't encompass approval of the political or discretionary choices that are the responsibility of the client. It certifies technical compliance with the law but does not amount to approval of the purpose, wisdom, or need for the contract. That determination is made by the body or person who has authority to enter into the contract.
- It provides an internal process or checklist to ensure that an attorney has reviewed the document before it is executed. No facial invalidities or ultra vires acts.
- As applied invalidities. What's the difference between ignorance, negligence, and criminal intent to circumvent the bidding process, an illegal kickback, or a bribe? Those involves question of fact beyond the opinion process unless no reasonable person would disagree with the conclusion under the given facts.
- Only opine based on the facts provided. If the client does not tell you that the vendor gave him a \$10,000 Rolex for Christmas, is related to one of the owners within the first or second degree of affinity, and plans to buy a piece of the business next month, each of these facts may influence your decision, especially since he neither disclosed this matters as required by law, failed to abstain from participating in the negotiations, and failed to abstain on the vote.